

CCASE:
BIG HORN CALCIUM V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

August 1, 1990

BIG HORN CALCIUM COMPANY

v.

Docket Nos. WEST 89-377-RM
WEST 90-80-M

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (1988) ("Mine Act"). Big Horn Calcium Company ("Big Horn") petitioned for interlocutory review of orders of the administrative law judges assigned to this case. For the reasons set forth below, the petition for interlocutory review, as amended, is granted and this proceeding is remanded for further proceedings consistent with this order.

On review Big Horn asserts that Administrative Law Judge Michael A. Lasher abused his discretion by terminating the evidentiary hearing that was in progress and withdrawing from the case before Big Horn had the opportunity to present its evidence. It also contends that Administrative Law Judge James A. Broderick, the judge assigned to this matter following Judge Lasher's withdrawal, abused his discretion by ruling that all evidence of record developed during the truncated hearing before Judge Lasher would be disregarded and that a de novo hearing would be held in Denver, Colorado.

I.

This proceeding commenced when Big Horn contested citations issued by the Secretary of Labor ("Secretary") at the Granite Canyon Quarry in Laramie County, Wyoming. The case was assigned to Judge Lasher who, in the notice of hearing, directed each party to serve on the other a list of witnesses and exhibits and a precise statement of the issues. The parties exchanged witness and exhibit

lists and filed brief statements of issues. The Secretary listed Thomas Markve and Michael Munoz, inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"), as her witnesses. Big Horn listed five individuals as witnesses. Big Horn served interrogatories on the Secretary, but the Secretary did not conduct any discovery.

The evidentiary hearing commenced at 10:30 a.m. on March 21, 1990. Proceeding first, counsel for the Secretary completed his direct examination of Inspector Markve on the first day of the hearing. On the second day of the hearing, counsel for Big Horn was cross-examining this witness when Judge Lasher terminated the hearing. The judge stated that he would be issuing orders to counsel requiring them to further prepare this case for hearing through additional discovery. Tr. 264. Judge Lasher also presented on the record his personal views on a number of subjects not germane to this proceeding. Later in the day on March 22, Judge Lasher issued a written order disqualifying himself from hearing this case.

The case was reassigned to Judge Broderick. After conferring with the parties, Judge Broderick issued a prehearing order setting the case for a de novo hearing in Denver, Colorado, and ruling that the transcript from the previous hearing would not be considered as substantive evidence. (Big Horn had requested that the judge consider the transcript from the previous hearing as part of the substantive record in this case and that the continued hearing be held in Missoula, Montana). The judge also ordered the parties to file more detailed prehearing statements and he allowed additional discovery.

In its petition for interlocutory review, Big Horn maintains that Judge Lasher terminated the hearing in this matter without cause and without allowing Big Horn to present its case or cross-examine the Secretary's witnesses. It argues that in terminating the hearing Judge Lasher arbitrarily denied three out-of-state witnesses, who had appeared in Denver voluntarily at personal expense, the right to testify on behalf of Big Horn. It also asserts that Judge Lasher materially prejudiced Big Horn when he arbitrarily withdrew from the proceeding without issuing a decision on the merits. Further, Big Horn maintains that, after the reassignment to him, Judge Broderick abused his discretion and prejudiced Big Horn by granting the Secretary's request that all evidence presented at the previous hearing be disregarded and a de novo hearing be held. Big Horn asserts that it has no funds with which to subpoena and pay the travel expenses of its witnesses, to appear and defend itself in deposition or at a de novo hearing in Denver, or to pay any penalties assessed by the Secretary. Finally, it states that its witnesses are not available to again return voluntarily to Denver from Montana at personal expense.

Big Horn requests that the Commission issue an order vacating Judge Broderick's orders and staying any further hearing pending review of this matter, awarding attorney's fees to Big Horn pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, and vacating the citations that are the subject of this proceeding. In response, the Secretary requests that the petition be denied or, in the alternative, that the Secretary be allowed to conduct discovery into the issue of Big Horn's present operational and financial status. Big Horn filed a response opposing further discovery in this case and supplemented its petition with numerous attachments in an attempt to prove its insolvency. In response, the Secretary repeated her request for discovery into Big Horn's insolvency claims based, in part, on the documents submitted by Big Horn.

II.

The pleadings filed before the Commission on review make clear that a factual dispute exists concerning Big Horn's ability to participate effectively in any further hearing before the administrative law judge. The Secretary requests further discovery so that she can fully and properly respond to Big Horn's claim of insolvency. She maintains that this claim of insolvency and the effect, if any, of such claim on this case should be addressed by the administrative law judge in the first instance. As stated above, Big Horn opposes further discovery but submitted documents not previously entered into the record in support of its claim of insolvency.

The issue of Big Horn's financial status was only sketchily developed before the judge. The resolution of this issue could have a major effect on the need for a hearing and the location of the hearing site. We agree with the Secretary that the administrative law judge is the appropriate adjudicator to resolve this factual dispute. Therefore, pursuant to section 113(d)(2)(C) of the Mine Act, 30 U.S.C. 823(d)(2)(C), we remand this proceeding to Administrative Law Judge Broderick for further proceedings consistent with this order. Big Horn should be given the opportunity to fully develop in the record its proffer regarding its financial viability. The Secretary should be given the opportunity to respond and, if appropriate, to conduct reasonable discovery on the insolvency issue. Based on the record developed, the parties can then reconsider how they wish to proceed in this case and, if a hearing is necessary, the judge can reconsider the location of the hearing site. The order setting the hearing in Denver, Colorado, is vacated.

The Commission's procedural rule at 29 C.F.R. 2700.51 provides that the judge "shall give due regard to the convenience and necessity of the parties" in setting a hearing site. We have previously held that an administrative law judge abused his discretion in holding a prehearing conference 900 miles from the office of a small quarry operator. *Cut Slate, Inc.*, 1 FMSHRC 796 (July 1979). The Commission's procedural rule is derived from section 5(b) of the Administrative Procedure Act, 5 U.S.C. 554(b). The legislative history of this section provides that "the agency's convenience is not to outweigh that of the private parties." Sen. Doc. No. 248, 79th Cong., 2d Sess., 203 (1946). Thus, a careful balancing of interests is required in setting a hearing site and on remand the judge should consider the financial health of Big Horn, the location of its witnesses and the ability to secure their attendance when making this determination.

III.

We agree with Big Horn that Judge Lasher erred in terminating the hearing on March 22 prior to Big Horn's cross-examination of the Secretary's witnesses and prior to the testimony of its own witnesses, including witnesses that it maintains traveled to Denver at their own expense. Nothing in the record suggests reasonable grounds for the judge to have terminated the hearing during Big Horn's cross-examination of Inspector Markve. The stated reason given by the judge was to allow the parties to conduct additional discovery. At the time he terminated the hearing, however, neither party had requested a continuance and an ample opportunity for discovery had been previously provided. Although an administrative law judge is granted broad authority in the conduct

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of a hearing, we hold that Judge Lasher abused this authority in abruptly terminating the hearing without good cause.

We disagree, however, with Big Horn's assertion that, following the inappropriate termination of the hearing, Judge Lasher's recusal and the substitution of Judge Broderick was an abuse of discretion that materially prejudiced Big Horn. Section 113(d)(1) of the Mine Act, 30 U.S.C. 823(d), gives an operator the right to a hearing before an administrative law judge but it does not confer the right to a hearing before a particular judge. See also 29 C.F.R. 2700.50. An administrative law judge is permitted to withdraw from a case whenever he deems himself disqualified. 30 C.F.R. 2700.81; 5 U.S.C. 556(d). If the judge who is to decide the case is not the same judge who conducted the hearing and the proceeding is one in which "the resolution of material conflicting testimony requires a determination of the credibility of witnesses," a party may request a de novo hearing before the substitute judge. *United States Steel Corp.*, 6 FMSHRC 1423, 1429 (June 1984). In this case, however, Big Horn is asking that the proceeding not be heard de novo. Big Horn has set forth no other substantive reason why this case cannot proceed before Judge Broderick.

Judge Broderick ordered a de novo hearing at the request of the Secretary. As discussed above, a de novo hearing may be procedurally necessary in some instances. In this case, however, the Secretary's first witness has not completed his testimony and there has been no showing that resolution of material conflicting testimony will be necessary. Given the posture of this case, we conclude that the judge erred in ordering a de novo hearing. Since Inspector Markve will be returning to testify, the judge will be able to fully evaluate his credibility. Thus, if the hearing on the merits is resumed in this case, it should commence with the cross-examination of Inspector Markve and the record of the hearing held on March 21 & 22, 1990, should be considered by the judge in reaching his decision on the merits.

Certain portions of the transcript of the March 21-22 hearing contain comments of Judge Lasher that are not germane to this proceeding. As a consequence, those portions of the hearing transcript are to be disregarded. *Belcher Mine, Inc.*, 7 FMSHRC 1019, 1030 (July 1985).

VI.

Big Horn also requests attorney's fees, costs and expenses, pursuant to the EAJA, incurred by Big Horn during the March 21-22 hearing. The Commission has promulgated procedures that describe who is eligible for an award of attorney's fees and costs pursuant to the EAJA, and explain how to apply for such awards. 29 CFR Part 2704. Big Horn's request for an award

has not been filed in accordance with these requirements. Consequently, its request is denied.

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Finally, Big Horn's request that the subject citations be vacated and the associated civil penalties be dismissed is denied. Big Horn is entitled to a fair hearing as set forth in the Mine Act, but it is not entitled to a dismissal of the Secretary's case.

V.

For the foregoing reasons, the order of Judge Broderick setting this proceeding for a de novo hearing in Denver, Colorado, is vacated and this case is remanded to the judge for further proceedings consistent with this order.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A Lastowka, Commissioner

L. Clair Nelson, Commissioner

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